DATO' MOKHTAR HASHIM & ANOR.

v.

PUBLIC PROSECUTOR

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH LP
ABDUL HAMID OMAR FJ
EUSOFFE ABDOOLCADER FJ
[CRIMINAL APPEAL NOS. 10 & 11 OF 1983]
23 JULY 1983

CRIMINAL PROCEDURE: *Security case - Murder - Case classified as security case by virtue of certificate issued by Attorney General - Preliminary objection raised by Counsel at inception of trial - That Attorney General could not and should not have issued his certificate - This point decided before trial in an application by 1st appellant - Leave to apply for certiorari to quash Attorney General's certificate refused - No appeal against this order - Whether this issue can be reopened at appeal.*

CRIMINAL LAW AND PROCEDURE: *Cautioned Statement - Voluntariness - Allegation of inducement - Burden on prosecution to prove statement made voluntarily.*

CRIMINAL LAW AND PROCEDURE: *Impeachment of credit of prosecution witness - Application by Public Prosecutor - Evidence in Court different from statement to police - Defence not allowed to cross-examine witness at the end of examination-in-chief - Whether Judge was right in impeaching credit and denying right to Counsel to cross-examine - Whether there was any miscarriage of justice - At what stage should Court impugn a witness's credit.*

EVIDENCE: *Alibi - Defence of - Whether burden on accused - Whether Court limited to consider only established defence of alibi or all other evidence.*

EVIDENCE: *Circumstantial evidence - Must point to one conclusion only - Guilt of accused.*

EVIDENCE: *Lock-up register and station diaries - Whether admissible.*

LEGAL PROFESSION: *Attack by defence Counsel on integrity of learned trial Judge - Allegation of intimidation, bias and prejudice and fleeting suggestion of conspiracy with prosecution - Complaint that Judge applied double standards in dealing with witnesses for prosecution and defence - Protest by Public Prosecutor against intemperate language used by defence Counsel against Judge - Whether line of attack ill-chosen, mischievous and contemptuous - Whether remarks made by Judge affected proceedings - Whether there was any miscarriage of justice.*

This was an appeal by the appellants against their conviction and death sentence by the High Court, Kuala Lumpur on 5 March 1983 ([1983] CLJ (Rep) 721) on the charge of murder of the former Speaker of the Negri Sembilan State Legislative Assembly, Dato Mohd. Taha bin Talib on 14 April 1982 at or about 1.30 a.m. at Gemencheh in Negri Sembilan, an offence punishable under s. 302 of the Penal Code read with s. 34 of the same Code. The deceased was found dead from bullet wounds outside his house in Gemencheh in the early morning on 14 April 1982. The case was classified as a security case under the Essential (Security Cases) Regulations, 1975 ("the Regulations") by virtue of a certificate issued by the Attorney General under the provisions of reg. 2(2) thereof.

Counsel for the 1st appellant took as his first point, the failure of the learned trial Judge to consider the preliminary objection he had raised at the inception of the trial and renewed subsequently that this was not a security case but one of law and order, that in the circumstances, the Attorney General could not and should not have issued his certificate under reg. 2(2) of the Regulations, that the trial was accordingly a nullity and that it should be remitted to the Magistrate's Court for a preliminary enquiry prior to any committal for a trial by jury in the High Court under the provisions of the Criminal Procedure Code.

A major frontal attack was made by Counsel for both the appellants against the learned trial Judge's finding that a statement (P101) made by the 2nd appellant which amounted to a confession was voluntary. He made the statement in question on 23 June 1982 after his arrest on 29 May 1982 under s. 112 of the Criminal Procedure Code to DSP Mohd. Bashir bin Ali (PW8) which implicated not only himself but also his co-accused. The statement purports to narrate the planning and preparation of the murder of the deceased which gave various dates of meetings held between the participators and also gave a somewhat vivid account of the actual murder, in that, the 1st appellant had fired the fatal shots. The voluntariness of the statements was put in issue as the 2nd appellant had alleged that he was induced to give the statement and after a *voir dire* the learned trial Judge had held the statement to be voluntary and therefore admissible, and accordingly admitted it in evidence and put in as P101. In this connection, the Public Prosecutor had applied that the decision of the Federal Court in *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66 (at p. 72) be reconsidered in reference to reg. 21 of the Regulations which states to the effect that the prosecution must prove that a statement made by an accused person was voluntary if they wanted to rely on it and submitted that that regulation on its wording precludes any such burden on the prosecution.

The Gombak Police Station station diaries (D105 A-E) and lock-up register (D104) for the period from 29 May 1982 to 10 July 1982 were put in by the defence through Insp. Aziz bin Abdullah (DW4) in the *voir dire* and heavily relied on, and it was the entries in the station diaries that appeared to play a prominent part in the attack by the defence on P101. The learned trial Judge had dismissed the station diaries as being unreliable on the ground that the recording of the entries appeared to him to have been done in a slipshod manner and referred to two examples of what he considered to be erroneous entries. The admissibility of the station diaries was made an issue and the Public Prosecutor contended that they were not public documents in that they were not available for public inspection and the entries therein were not made for public purposes but only to regulate the internal business of the police force. He contended that the station diaries were kept by virtue of administrative orders called Standing Orders made by the Inspector General of Police under s. 97 of the Police Act 1967. Counsel for the 2nd appellant, however, relied on s. 35 of the Evidence Act 1950 which provides (so far as relevant for present purposes) that an entry in an official book or register stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty was itself a relevant fact.

The case against the 1st appellant was circumstantial, and in relation to the death of the deceased on the evidence of Sudin bin Shariff (PW22) and Datin Norsiah bte Osman (PW23), the deceased's father-in-law and widow respectively, as to the deceased being lured out of his house and hearing gunshots at the relevant time, the testimony of the pathologist of identification of the deceased's body, that of Liah bte Nahu (PW25) of seeing a white car with two figures alighting and then hearing two shots and the car speeding off in the direction of the main road, the discovery of the deceased's body and the finding of the two bullet casings (P4 and P5) by Bahadon bin Baharom the OCPD Tampin (PW17), rested primarily on the evidence of Atun bin Ali (PW18) that he saw the 1st appellant in the company of four others in Gan Kee Estate some 3½ miles away from the scene of the crime about 1½ hours

before the commission of the offence, the evidence of the pathologist who performed the autopsy and recovered two bullets (P18 and P19), the evidence of Gee Hock Eng (PW9), the firearms identification expert for the prosecution together with the evidence of the police officers who collected and test-fired several .32 pistols and revolvers, and the evidence as to the .32 Walther semi-automatic pistol (P88) which was alleged to belong to and to have been in the possession, custody and control of the 1st appellant at the relevant time based on the pistol licence (P16), the letter written by the 1st appellant to SAC Yahya (P17A), a statement (P119) made by the 1st appellant to DSP Bashir on 14 May 1982 under s. 112 of the Criminal Procedure Code and the evidence of SAC Yahya and Insp. Rashid (PW31).

Counsel for the 1st appellant complained that there was also a denial of justice when the learned trial Judge refused an application to impeach the credit of Atun (PW18) under s. 155(c) of the Evidence Act by the production of the statement or statements he had made to the police. This application was made on the ground that Atun (PW18) had in his oral evidence departed from his statement or statements to the police, relying on the decision of the Federal Court in *Husdi v. PP* [1980] 2 MLJ 80 (at p. 81). Another witness who was called by the prosecution and apparently intended to be a Crown witness in the case had turned hostile and completely resiled from the statement he had made to the police on 21 June 1982 under s. 112 of the Criminal Procedure Code which was put in as P120. An application was made by the Public Prosecutor to impeach his credit under s. 155(c) of the Evidence Act, and the relevant passages in his statement were put to him which were wholly different from his evidence in Court. He admitted making the statement but denied its contents which he said he was forced to state under pressure by the interrogating officer. At the conclusion of the examination-in-chief by the Public Prosecutor, the learned trial Judge had refused to allow cross-examination of this witness by Counsel and said that he had found serious and material contradictions between the evidence and the statement of this witness to the police and immediately made an order impeaching his credit.

As to the ownership of the pistol (P88) by the 1st appellant, the prosecution relied on the evidence of SAC Yahya and Insp. Rashid and P16 which was the pistol licence and P17A which was a letter written by the 1st appellant to SAC Yahya. Counsel however contended that the hand-written contents of P16 were hearsay and that although the licence itself was primary evidence it did not reflect the truth of the contents. He also contended that P17A was documentary hearsay and that the handwriting and signature therein must be proved to be that of the 1st appellant. There was also the evidence of Gee (PW9) who had testified as a firearms identification expert for the prosecution. The evidence disclosed that several .32 pistols and revolvers were test-fired by the police and the expended bullets and casings were sent to Gee for examination. Amongst these was P88 and the expended bullets and casings from it were examined by Gee who as a result came to the conclusion that the two bullets taken from the body of the deceased (P18 and P19) and the bullet casings (P4 and P5) had been fired from P88. Gee had testified that he had done 62 cases of firearms identification which formed the main part of his work over the last six years and that he had given evidence on three occasions in the Sessions and Magistrate's Courts thereon, and had apart from a degree in chemistry practical training in this field. Counsel strenuously contended that the learned trial Judge was wrong in accepting Gee as an expert in firearms identification and questioned his qualifications, background, working experience, training and experience in Court. He also complained that Gee had never given evidence in the High Court. The defence of the 1st appellant rested primarily and substantially on that of alibi and he had called a large number of witnesses who had testified that at or about the material time he was in his house in Tampin. Counsel had attacked several aspects of the learned Judge's assessment of the alibi evidence. He had also criticised the findings of Gee and relied on the

evidence of George Fassnacht (DW43) who was called by the 2nd appellant to testify as a firearms identification expert. Counsel contended that the learned trial Judge was wrong in holding that Fassnacht was not an expert in this field and not competent to give evidence as such.

Finally, the Public Prosecutor had made a vehement protest against the intemperate language and manner in which it was said Counsel for the 1st appellant both in his petition of appeal and address to the Federal Court had mounted a virtually personal attack on the integrity of the learned trial Judge with an overt allegation of intimidation, bias and prejudice and even a fleeting suggestion of conspiracy with the prosecution coupled with a complaint that he had applied double standards in dealing with the witnesses for the prosecution and the defence. He complained in his petition of appeal that the learned trial Judge had improperly and in a manner prejudicial to the defence made a judicial comment to the Public Prosecutor after having impeached the credit of Abdullah Ambik (PW30) that "he had slipped out of our hands", using the possessive pronoun in the plural and underscoring it, and in his address to the Federal Court said that this means "both hands are joined or tied together", thus tending to suggest some sort of collusion on his part with the prosecution. In yet another ground of appeal he said that the learned trial Judge had improperly and in a manner prejudicial to the defence and without justification intimidated a defence witness Tan Chin Boon (DW11) when he said "I am 52 years old. Don't try to cheat me. Who do you think you are trying to bluff?" or words to that effect.

Held:

[1] The certificate issued by the Attorney General under reg. 2(2) of the Essential (Security Cases) Regulations, 1975 was decided by the Federal Court in *Mohd. Nordin bin Johan v. Attorney General, Malaysia* [1983] 1 MLJ 68 which arose out of and in connection with these very same proceedings applied by one of the 1st appellant's co-accused. Indeed the 1st appellant himself had before the trial applied for leave to apply for *certiorari* to quash the Attorney General's certificate in this very matter and other consequential orders but leave was refused. There was no appeal against that order, presumably because of the decision of the Federal Court in *Mohd. Nordin bin Johan* (*ante*). This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to be an abuse of the process of the Court.

[2] The Federal Court had reaffirmed that that decision in *Johnson Tan Han Seng v. PP (ante)* sets out the law correctly. Any statement made by an accused person to be admissible must be voluntary and any other construction would be tantamount to subverting a basic right of an accused and give greater stringency to the Regulations than would be warranted or justified in our system of criminal jurisprudence.

[3] The lock-up register was clearly admissible under s. 35 of the Evidence Act as it is a journal within r. 34(2) of the Lockup Rules 1953.

[4] The learned trial Judge, had, in considering the admissibility of the statement made by the 2nd appellant, adopted an approach that was incorrect in that he seemed to have virtually reversed the burden of proof and cast it on the 2nd appellant to rebut the evidence for the prosecution instead of dealing with the matter as one for the prosecution to establish beyond reasonable doubt that P101 was voluntary. In the circumstances, the prosecution had failed to discharge the burden incumbent on it in law. On the evidence and the facts and circumstances it will be unsafe to treat P101 as voluntary and accordingly it should not have been admitted as evidence.

[5] The entire case against the 2nd appellant rested on his statement (P101) and nothing else and apart therefrom there was no other evidence against him. His defence should not therefore have been called as there was no case against him. Accordingly, his appeal was allowed, his conviction and sentence set aside and he was acquitted and discharged.

[6] The evidence of Atun (PW18) was accepted by the learned trial Judge who found him to be a consistent witness unshaken by very severe cross-examination, and found no reason to interfere with his assessment.

[7] When a witness's credit is sought to be impugned under the provisions of s. 145 and 155(c) of the Evidence Act his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. No immediate order of summary nature can be or should be made as was done in this case and the right of cross-examination or re-examination according to the circumstances should not be denied as it may well be that on the exercise of such right his credit might be repaired, restored or re-established. The procedure for impeachment should be on the lines set out in *Muthusamy v. PP* [1948] MLJ 57 but the evidence of such a witness must be considered as a whole with the rest of the evidence at the appropriate stage and that any practice which might have developed, in the lower Courts of making an immediate order of impeachment once a material discrepancy is discovered and no explanation is either offered or accepted, is wholly wrong and should cease immediately.

[8] In view of the overall strength of the other evidence against the 1st appellant to sustain the charge against him, the Federal Court was satisfied that no substantial miscarriage of justice had been occasioned on immediate order of impeachment of Abdullah Ambik (PW30) and the denial of cross-examination of this witness by Counsel and accordingly the proviso to s. 60(1) of the Courts of Judicature Act, 1964 was applied.

[9] On the evidence P16 was the 1st appellant's licence and no proof of its contents was necessary.

[10] The Federal Court was of the view that the prosecution had established that the 1st appellant was in possession, custody and control of the pistol (P88) at the material time specified in the charge and that the learned trial Judge was correct in coming to that conclusion.

[11] The learned trial Judge who saw and heard Gee (PW9) had accepted him as an expert after a considered assessment of his evidence and there was no reason or justification whatsoever to dissent from his conclusion.

[12] In the light of the evidence adduced by the prosecution that the pistol (P88) from which the fatal shots were fired belonged to and was in the possession, custody and control of the 1st appellant at the material time, the facts proved at the close of the prosecution case point to one and only one conclusion, that it was the 1st appellant who had fired the fatal shots that killed the deceased. The learned trial Judge therefore correctly concluded that the prosecution had established a case against the 1st appellant requiring him to enter upon his defence.

[13] The learned trial Judge had considered the alibi evidence adduced in some detail and on his assessment and for the reasons he had given had held that this defence was unsubstantiated. This was essentially a question of fact and turns primarily on the credibility of witnesses and there was no reason to interfere with his assessment.

[14] In all these circumstances, the learned trial Judge had found that the evidence adduced by and for the 1st appellant in his defence as a whole had not succeeded in creating any doubt on the truth of the case for the prosecution and accordingly concur with his finding. In the event the appeal by the 1st appellant was dismissed and his conviction and sentence of death was affirmed.

[15] There was no justification whatsoever in respect of the matters raised before the Federal Court by Counsel for the vituperative nature of the language in which the petition of appeal had been couched and the contumelious suggestions that have been put forward in his address which had dragged the learned Judge into the arena of the conflict and subjected him to a personal attack with a virtual suggestion of complicity on his part. The Federal Court considered this line taken ill-chosen, mischievous and contemptuous in the circumstances.

[16] The appellants have not been denied a fair trial and the remarks that were subject to attack, though perhaps injudicious, were bereft of any sinister connotation against the background of the circumstances in which they were made, and could not and did not affect the proceedings or cause in any way any miscarriage of justice. It is hoped that this admonition will suffice to caution against any recurrence of a broadside of this nature grounded on blatantly inane innuendoes without any justification or basis merely in order to advance a cause.

[1st appellant's appeal dismissed. Conviction and sentence of death affirmed. 2nd appellant's appeal allowed. Conviction and sentence set aside. Acquitted and discharged.]

Cases referred to:

PP v. Sihabduin bin Salleh & Anor. [1980] 2 MLJ 273
Mohd. Nordin bin Johan v. Attorney-General, Malaysia [1983] CLJ (Rep) 271; [1983] 1 MLJ 68
Hunter v. Chief Constable of the West Midlands Police & Ors. [1982] AC 529
Tractors Malaysia Bhd. v. Charles Au Yong [1982] CLJ (Rep) 355; [1982] 1 MLJ 320
Johnson Tan Han Seng v. PP [1977] 2 MLJ 320
Dirgaj Deo Bahadur v. Beni Mahto & Ors. [1917] AIR PC 197
Ibrahim v. The King [1914] AC 599
Director of Public Prosecutions v. Ping Lin [1976] AC 574
Wong Kam-Ming v. The Queen [1980] AC 247
R. v. Wilson [1981] 1 NZLR 316
Sarwan Singh v. State of Punjab [1957] AIR SC 637
PP v. Thum Soo Chye [1954] MLJ 96
R. v. Priestley [1965] 51 Cr App R. 1
R. v. Prager [1972] 1 WLR 260
Zahiruddin v. Emperor [1947] AIR PC 75
R. v. Thompson [1893] 2 QB 12
Reg v. Pattinson and Laws [1973] 73 Cr App R. 417
Jayaraman and Ors. v. PP [1982] CLJ (Rep) 130; [1982] 2 MLJ 306
Watt or Thomas v. Thomas [1947] AC 484
Caldeira v. Gray [1936] MLJ 137
Husdi v. PP [1980] 2 MLJ 80
Paramasivam v. PP [1970] 2 MLJ 106
Sat Paul v. Delhi Administration [1976] AIR SC 294
John v. Rees [1970] 1 Ch 345
PP v. Datuk Haji Harun bin Haji Idris & Ors. [1977] 1 MLJ 180
Muthusamy v. PP [1948] 14 MLJ 57
Myers v. DPP [1965] AC 1001
Pamplin v. Gorman [1980] Crim LR 52
Su Ah Ping v. PP [1980] 1 MLJ 75

Baru Ram v. Prasanni [1969] AIR SC 93
Krishnabiharilal v. State [1956] AIR MB 86
Joyce v. Yeomans [1981] 1 WLR 549
R. v. Murphy [1980] QB 434
Kalua v. The State of Uttar Pradesh [1958] AIR SC 180
Anderson v. The Queen [1972] AC 100
R. v. Mckewen (No. 2) [1974] 1 NZLR 626
Gurcharan Singh & Anor. v. State of Punjab [1956] AIR SC 460
PP v. Chidambaram & Anor. [1928] AIR Mad 791
Cooper v. Bockett [1846] 13 ER 365
R. v. Sodo [1975] 61 Cr App R 131
Re Kumaraendran [1975] 2 MLJ 45

Legislation referred to:
Arms Act 1960, ss. 3, 4, 4(5)
Courts of Judicature Act 1964, s. 60(1)
Criminal Justice Act 1967 [UK], ss. 11(1), (8)
Criminal Procedure Code, ss. 112, 402A(2)
Essential (Security Cases) Regulations 1975, reg. 2(2), 21
Evidence Act 1950, ss. 35, 134, 145, 155(c)
Evidence Act [Ind], s. 35
Lockup Rules 1953, rr. 34(2), 20
Penal Code, ss. 34, 302
Police Act 1967, s. 97

For the 1st appellant - Jagjit Singh (Abdul Mutalib & Abu Zahar Ujang with him); M/s. Jagjit Singh & Co.
For the 2nd appellant - Manjeet Singh Dhillon (Lawrence Perera with him); M/s. Manjeet Singh Dhillon & Co.
For the respondent - Tan Sri Abu Talib bin Othman, PP (T.S. Sambanthamurthi, DPP with him)

JUDGMENT

Eusoffe Abdoolcader FJ:

The tragic events that transpired in the early hours of the morning of 14 April 1982 at Gemencheh in the State of Negeri Sembilan and the resultant death of Dato Mohd. Taha bin Talib, the former Speaker of the State Legislative Assembly, although perhaps not as startling or as dramatic as the assassination of Abraham Lincoln, generated waves in the country, culminating as they did in these proceedings, with this in turn unfolding, in the course of a trial over a span of some 76 days, a grim and gruesome tale of political intrigue, sorcery, conspiracy and murder involving a Minister of the Crown in office at the material times. The effect of all this was like a scandal in a monastery. And so a chain of events in a small town bore within it the seed of much bigger things.

The sequel to this unfortunate and deplorable occurrence was that Dato Mokhtar bin Hashim and Rahmat bin Satiman, the 1st and 2nd appellants in these consolidated appeals, Mohd. Nordin bin Johan, Aziz bin Tumpuk and Aziz bin Abdullah were jointly charged that they on 14 April 1982 at or about 1.30 a.m. at Kampong Seri Asahan, Gemencheh, in the District of Tampin, in the State of Negeri Sembilan, in furtherance of their common intention, did commit murder by causing the death of Dato Taha ('the deceased'), and that they had thereby committed an offence punishable under s. 302 read with s. 34 of the Penal Code.

The case was classified as a security case under the Essential (Security Cases) Regulations 1975 ('the Regulations') by virtue of a certificate issued by the Attorney General under the provisions of reg. 2(2) thereof. Aziz bin Tumpuk died before the commencement of the trial

and the case proceeded against the other four before Hashim bin Yeop Abdullah Sani, FJ, sitting in the High Court at Kuala Lumpur, and at the end of the case for prosecution, the learned Judge, applying the principle enunciated by this Court in *PP v. Sihabduin bin Salleh & Anor*. [1980] 2 MLJ 273 that the Court is not obliged under the Regulations to call on an accused to enter on his defence unless the prosecution has at that stage proved a *prima facie* case against him, acquitted Mohd. Nordin bin Johan and Aziz bin Abdullah but called on the appellants for their defence, and at the conclusion of the case for the defence convicted the appellants on the charge preferred and sentenced them to death. We should perhaps mention that the Public Prosecutor appealed against the acquittal of the other two accused but we dismissed his appeal (Federal Court Criminal Appeal No. 2 of 1983) on 9 June 1983.

The appellants now appeal against their conviction and sentence. We heard these joint appeals for some eleven days and at the conclusion of argument a month ago today reserved judgment. *Et sic ad judicium* (and so to judgment). We will in the course of this judgment be referring to several authorities not cited here or in the Court below but which appear to us to be pertinent to the contentions raised as the principles enunciated therein are well established and incontrovertible. We must nevertheless express our appreciation to Counsel on both sides for the careful arguments presented before us.

It is not necessary to preface this judgment with the facts and recount a summary of the evidence save to say that the deceased was found dead from bullet wounds outside his house in Gemencheh in the early morning on 14 April 1982, as we will have to refer to and consider the evidence pertinent to the grounds of appeal raised before us, and now proceed to discuss the several grounds of complaint in respect of the learned Judge's judgment in *casu*.

Mr. Jagjit Singh for the 1st appellant takes as his first point the failure of the learned Judge to consider the preliminary objection he raised at the inception of the trial and renewed subsequently that this was not a security case but one of law and order, that in the circumstances the Attorney General could not and should not have issued his certificate under reg. 2(2) of the Regulations, that the trial was accordingly a nullity and that it should be remitted to the Magistrate's Court for a preliminary enquiry prior to any committal for a trial by jury in the High Court under the provisions of the Criminal Procedure Code. The point taken was however decided by this Court in *Mohd. Nordin bin Johan v. Attorney-General, Malaysia* [1983] CLJ (Rep) 271; [1983] 1 MLJ 68 which arose out of and in connection with these very same proceedings by an application by one of the 1st appellant's co-accused. Indeed the 1st appellant himself applied on 20 August 1982 by Originating Motion A28 of 1982 for leave to apply for *certiorari* to quash the Attorney General's certificate in this very matter and other consequential orders but leave was refused on 1 September 1982. There was no appeal against that order, presumably because of the decision of this Court in *Mohd. Nordin Johan* (ante). This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instance of an abuse of the process of the Court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police & Ors.* [1982] AC 529 (at p. 542) which was applied by this Court in *Tractors Malaysia Bhd. v. Charles Au Yong* [1982] CLJ (Rep) 355; [1982] 1 MLJ 320 (at p. 321).

A major frontal attack has been made by both appellants against the learned Judge's finding that a statement made by the 2nd appellant which amounted to a confession was voluntary. The 2nd appellant was arrested on 29 May 1982 and detained under the Internal Security

Act 1960 at Gombak Police Station for some 42 days. He was interrogated whilst under detention, according to him, by an interrogation team of eight persons headed by Inspector Badaruddin bin Isa (RW1 in the *voir dire*) although the prosecution case is that the other seven were only on guard duty. On 23 June 1982 he made the statement in question under s. 112 of the Criminal Procedure Code which was recorded by DSP Mohd. Bashir bin Ali (PW8) and which amounted to a confession implicating not only himself but also his co-accused. The statement purports to narrate the planning and preparation of the murder of the deceased giving various dates of meetings held between the participators and also gives a somewhat vivid account of the actual murder, and he said in that statement that the 1st appellant fired the fatal shots. We would pause to state that according to Dr. Harcharan Singh Ahluwalia (PW3), the consultant pathologist who performed the autopsy on the deceased, Dato Taha had three bullet wounds in the head, chest and thigh and either of the first two would have been fatal. The voluntariness of the statement was put in issue and after a *voir dire* the learned Judge held the statement to be voluntary and therefore admissible, and it was accordingly admitted in evidence and put in as P101.

The Public Prosecutor has asked us in this connection to reconsider the decision of this Court in *Johnson Tan Han Seng v. PP* [1977] 2 MLJ 66 (at p. 72) to the effect that under reg. 21 of the Regulations the prosecution must prove that a statement made by an accused person was voluntary if they want to rely on it and submits that that regulation on its wording precludes any such burden on the prosecution. We see no reason to do so and reaffirm that that decision sets out the law correctly. Any statement made by an accused person to be admissible must be voluntary and any other construction would be tantamount to subverting a basic right of an accused and give greater stringency to the Regulations than would be warranted or justified in our system of criminal jurisprudence.

The Gombak Police Station station diaries (D105 A-E) and lock-up register (D104) for the period from 29 May to 10 July 1982 were put in by the defence through Inspector Aziz bin Abdullah (DW4) in the *voir dire* and heavily relied on, and it is the entries in the station diaries that appear to play a prominent part in the attack by the defence on P101. The learned Judge dismissed the station diaries as being unreliable on the ground that the recording of the entries appeared to him to have been done in a slipshod manner and referred to two examples of what he considered to be erroneous entries. Before us the admissibility of the station diaries was made an issue and the Public Prosecutor contends that they are not public documents in that they are not available for public inspection and the entries therein were not made for public purposes but only to regulate the internal business of the police force. He contends that the station diaries are kept by virtue of administrative orders called Standing Orders made by the Inspector-General of Police under s. 97 of the Police Act 1967. Mr. Manjeet Singh for the 2nd appellant, however, relies on s. 35 of the Evidence Act 1950 which provides (so far as relevant for present purposes) that an entry in an official book or register stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty is itself a relevant fact.

There is unfortunately no evidence before us as to the Inspector-Generals Standing Orders made under s. 97 of the Police Act with regard to the nature and purpose of a station diary and the ambit and extent of the official duty of the person making the entries therein to determine whether s. 35 of the Evidence Act indeed applies thereto. The Privy Council held in *Dirgaj Deo Bahadur v. Beni Mahto & Ors.* [1917] AIR PC 197 that if, in the case of official documents admissible in evidence under s. 35 of the Indian Evidence Act (which is in *pari materia* with ours), it could be shown that any particular part was in excess of the

official duty by reason of which it came into existence, that part might not be admissible. The lock-up register however is clearly admissible under s. 35 of the Evidence Act as it is a journal within r. 34(2) of the Lockup Rules 1953, and the lock-up register produced has cross-references to entries in the station diaries; this correlation would therefore make all the relevant entries in the station diaries admissible as they would form part of the lock-up register and the two must therefore be read conjointly. When it is the duty of a public officer to make some entries in any public or other official book it is admissible in evidence to prove the truth of the fact entered as well as the fact that the entries were made by him although their authenticity be not confirmed by the usual test of truth, namely, the swearing and cross-examination of the person who prepared them. In any event all the entries were put to Inspector Aziz who confirmed them and they accordingly form part of the evidence before the learned Judge in the *voir dire*.

No statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement [*Ibrahim v. The King* [1914] AC 599 (at p. 609 per Lord Sumner)] and this test was accepted by the House of Lords as the correct approach in *Director of Public Prosecutions v. Ping Lin* [1976] AC 574 in which the House said that is not necessary before a statement is held to be inadmissible because it is not shown to have been voluntary, that it should be thought or held that there was impropriety in the conduct of the person to whom the statement was made, and that what has to be considered is whether a statement is shown to have been voluntary rather than one brought about in one of ways referred to (at pp. 594, 602). It appears from the decision in *Ping Lin (ante)* that the classic test of the admissibility of an accused's confession that the prosecution must establish beyond reasonable doubt that it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by oppression should be applied in a manner which is part objective, part subjective.

In the Privy Council in *Wong Kam-Ming v. The Queen* [1980] AC 247 Lord Hailsham of St. Marylebone said (at p. 261):

> ... any civilised system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods. This is not only because of the potential unreliability of such statements, but also, and perhaps mainly, because in a civilised society it is vital that persons in custody or charged with offences should not be subjected to ill treatment or improper pressure in order to extract confessions. It is therefore of very great importance that the Courts should continue to insist that before extra-judicial statements can be admitted in evidence the prosecution must be made to prove beyond reasonable doubt that the statement was not obtained in a manner which should be reprobated and was therefore in the truest sense voluntary.

In *R. v. Wilson* [1981] 1 NZLR 316, the New Zealand Court of Appeal held that confessions obtained by overbearing the will of a person in custody by tactics amounting to compulsion should not be received in evidence and that whether a case is of that kind is a question of fact and degree. The defendant in that case had been subjected to prolonged interrogation in the confinement of a small room which was unfair and oppressive and it was held that there was accordingly oppression and the means employed must be regarded as themselves involving a miscarriage of justice.

It is open to an appellate Court to interfere with the finding on a question of fact as to the voluntariness of a confession if the impugned finding has been reached without applying the true and relevant legal tests and consideration of relevant matters [*Sarwan Singh v. State of Punjab* [1957] AIR SC 637 (at p. 643); *PP v. Thum Soo Chye* [1954] MLJ 96 (at p. 99)].

As we have said the learned Judge wholly discounted the entries in the station diaries on the basis of two wrong entries which have however been explained by Mr. Manjeet Singh as not in fact being erroneous. The entries in the station diaries which were in fact confirmed by the evidence of Inspector Aziz show prolonged periods of interrogation by Inspector Badaruddin and extremely odd hours of interrogation ranging into the early hours of the morning, in breach of r. 20 of the Lockup Rules. Inspector Badaruddin said in cross-examination as to the latter that he did that because he felt like interviewing the 2nd appellant at that time and that it was the right time to do so but that whenever the 2nd appellant said he did not want to be questioned this request was acceded to and the appellant would be allowed to sleep if he so requested. We think this explanation must be looked at askance and with considerable circumspection as there would hardly be any point in taking a man out for questioning and then abandoning the exercise by acceding to his request. If that was indeed the case, it would perhaps have been more feasible and just as plausible and would have saved a lot of time and trouble, not to mention disappointment to Inspector Badaruddin and obtrusion on the poor man's slumber, to have sent him an invitation to attend for interrogation with a 'r.s.v.p.' through bearer. We must stress that what is involved in all this was the systematic interrogation of a detainee, not overtures for friendly poker sessions. On Inspector Badaruddin's evidence, it would seem the 2nd appellant apparently spent the better part of his sojourn in the Gombak Police Station in its conference room and all that he did almost all the time was to eat, sleep and pray as and when he pleased - and all this at Government expense too!

As to the long hours and odd hours of interrogation stated in the station diaries this would appear to be suggestive of oppression within the definition thereof by Sachs J, in *R. v. Priestley* [1965] 51 Cr App R 1 which was adopted in *R. v. Prager* [1972] 1 WLR 260. We are told by the Public Prosecutor that this might be the method adopted by the Special Branch, but if we are to approbate and endorse the whims and fancies of interrogators in the systems they choose to utilise, we might as well countenance an interrogator's preference to stand a man on his head or hang him up by his toe-nails whilst questioning him so as the better to enhance the flow of blood to his cerebral cavity and stimulate his noetic faculties and recollection of past and recent events. We need hardly remind those involved in the interrogation of witnesses and accused persons that any methods adopted in the process outside accepted norms and standards must be able to withstand the test of strict curial scrutiny.

Inspector Badaruddin testified that he did not interrogate the 2nd appellant for more than an hour at a time but against this there is an entry in the station diary on 3 June 1982 relating to intensive interrogation ('soal desak'). Inspector Badaruddin also said that the 2nd appellant was allowed to pray whenever he wanted to but the 2nd appellant's denial as to this appears to be confirmed by a specific entry in the station diary on 10 June 1982 giving permission for him to pray which would be quite unnecessary if in fact there was no restriction in this regard. The suggestion of the prosecution is that these entries are erroneous, but there is no evidence to this effect and they are there and should have been considered by the learned Judge who wholly disregarded them. Inspector Badaruddin and his seven-man team of guards or interrogators, whichever they might have been (but we should point out that the 2nd appellant was able in his evidence to identify each one of them and say what part they played), did not produce their diaries. This again would lay their evidence open to adverse criticism to the extent of diminishing its value [*Zahiruddin v. Emperor* [1947] AIR PC 75 (at p. 77)].

The 2nd appellant in his evidence mentioned three specific inducements held out to him. First, that he gave in to the pressure because he was told that any statements made by him would not be used against him in Court and he could make another statement later on. Another statement (D102) was in fact taken from him on 9 July 1982 by another police officer, DSP Mohd. Fauzi Shaari, in which the 2nd appellant gave an alibi as to his whereabouts on 13 & 14 April 1982 and which he said was the truth. Second, he said he was told that if he co-operated he would become a witness for the Government. The alteration at the top of P101 confirms the change of designation of his statement from that of a witness to one by an accused person according to the practice of classification of statements confirmed by the evidence of DSP Bashir and SAC Yahya bin Yeop Ishak (DW2 in the *voir dire* - PW29 in the main trial). Third, he said he was told he would be given a better job. Again the 2nd appellant's signatures at the end of each page in P101 varied from page to page even to the naked eye, as DSP Bashir himself conceded under cross-examination. The station diaries also disclose that Inspector Badaruddin saw the 2nd appellant before P101 and D102 were recorded by DSP Bashir and DSP Mohd. Fauzi respectively which again might perhaps tend to suggest the continuing influence of the interrogating officer in making his presence felt.

The evidence disclosed that the 2nd appellant made a statement to Inspector Badaruddin on 4 June 1982 revealing a plot involving the 1st appellant and this was communicated to SAC Yahya who saw him on 7 June when it was said the 2nd appellant repeated the allegations to him. This statement was tape-recorded on 10 June and a formal statement (P101) was recorded from him in writing on 23 June by DSP Bashir. According to the learned Judge the statements made on all these dates were the same but SAC Yahya in his evidence under cross-examination said specifically that the information the 2nd appellant gave on 4 June did not relate to the offence under s. 302 of the Penal Code. SAC Yahya also said in his evidence that on 7 June at about 8.30 a.m. Inspector Badaruddin told him that the 2nd appellant was ready to narrate and when he met the latter at 3.00 p.m. that day the 2nd appellant was still being interrogated and he was told that the 2nd appellant was ready to speak and was ready to give a statement, and Mr. Manjeet Singh says the word 'ready' used three times tends to suggest anticipatory preparation negating a voluntary element in what occurred as a sequence. SAC Yahya testified he then listened to what the 2nd appellant had to say for three hours but did not reduce this into writing nor cause his statement to be recorded then and Inspector Badaruddin continued his interrogation from 7 until 22 June. Again if P101 which was recorded on 23 June clinched the matter in enabling the 2nd appellant to make a clean breast of things there was no need for DSP Mohd. Fauzi to record the second statement (D102) in which the 2nd appellant wholly resiled from what he had stated previously and gave an alibi.

The learned Judge gave no consideration to the several matters we have referred to and he appears to have dealt in considering the admissibility of P101 with the specific allegations of the 2nd appellant with regard to deprivation of food and drinks, the manner in which he was allowed to be dressed, the matter of his being prevented from performing his prayers, his complaint of deprivation of sleep and that prior to the recording of P101 he was subjected generally to inhuman treatment, and came to his several conclusions on these matters by assessing the evidence in relation thereto. It would appear that in doing this the learned Judge adopted an approach that was incorrect in that he seemed to virtually reverse the burden of proof and cast it on the 2nd appellant to rebut the evidence for the prosecution instead of dealing with the matter as one for the prosecution to establish beyond reasonable doubt that P101 was voluntary. In the circumstances we have adumbrated we do not think that the prosecution has discharged the burden incumbent on it in law. It would on the evidence and the facts and circumstances we have touched on and in the light of the

authorities be wholly unsafe to treat P101 as voluntary and we accordingly hold that it should not have been admitted as evidence. It is pertinent in this connection to bear in mind the dictum of Cave, J, in *R. v. Thompson* [1893] 2 QB 12 (at p. 18) which was cited with approval by Lawton, LJ, in *Reg. v. Pattinson and Laws* [1973] 73 Cr App R 417 (at p. 424).

The entire case against the 2nd appellant rests on his statement (P101) and nothing else and apart therefrom there is no other evidence against him. His defence should not therefore have been called as there was no case against him. We accordingly allow his appeal, set aside his conviction and sentence and acquit and discharge him.

We next turn to consider the case against the 1st appellant now that P101 is no longer in evidence. The case against him is of course circumstantial, and in relation to the death of the deceased on the evidence of Sudin bin Shariff (PW22) and Datin Norsiah binti Osman (PW23), the deceased's father-in-law and widow respectively, as to the deceased being lured out of his house and hearing gunshots at the relevant time, the testimony of the pathologist of identification of the deceased's body, that of Liah binti Nahu (PW25) of seeing a white car with two figures alighting and then hearing two shots and the car speeding off in the direction of the main road, the discovery of the deceased's body and the finding of the two bullet casings (P4 and P5) by Bahadon bin Baharom, the OCPD Tampin (PW17), rests primarily on the evidence of Atun bin Ali (PW18) that he saw the 1st appellant in the company of four others in Gan Kee Estate some three and a half miles away from the scene of the crime about an hour and a half before the commission of the offence, the evidence of the pathologist who performed the autopsy and recovered two bullets (P18 and P19), the evidence of Gee Hock Eng (PW9), the firearms identification expert for the prosecution together with the evidence of the police officers who collected and test-fired several .32 pistols and revolvers, and the evidence as to the .32 Walther semi-automatic pistol (P88) which was alleged to belong to and to have been in the possession, custody and control of the 1st appellant at the relevant time based on the pistol licence (P16), the letter written by the 1st appellant to SAC Yahya (P17A), a statement (P119) made by the 1st appellant to DSP Bashir on 14 June 1982 under s. 112 of the Criminal Procedure Code and the evidence of SAC Yahya and Inspector Rashid bin Abdul Lajis (PW31).

Where circumstantial evidence is the basis of the prosecution case the evidence proved must irresistibly point to one and only one conclusion, the guilt of the accused, but in a case tried without a jury the failure by the Court to expressly state this is not fatal and it would suffice if it merely says that it is satisfied as to the guilt of the accused beyond reasonable doubt [*Jayaraman & Ors. v. PP* [1982] CLJ (Rep) 130; [1982] 2 MLJ 306 (at p. 310)].

We now turn to the evidence adduced by the prosecution to consider whether this test is satisfied in the case against the 1st appellant.

First, the evidence of Atun in relation to the 1st appellant we have referred to. His evidence was accepted by the learned Judge who found him to be a consistent witness unshaken by very severe cross-examination, and we can find no reason to interfere with his assessment. The credibility of a witness is primarily a matter for the trial Judge. There is a homogeneous concatenation of authority on this principle and we refer to the *locus classicus* on this aspect in a passage in the judgment of Lord Thankerton in *Watt or Thomas v. Thomas* [1947] AC 484 (at p. 487). The Privy Council said in *Caldeira v. Gray* [1936] MLJ 137 that the functions of an appellate Court, when dealing with a question of fact, and a question of fact in which questions of credibility are involved, are limited in their character and scope, and that in an appeal from a decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, an appellate Court must in order to reverse, not merely entertain

doubts whether the decision below is right but be convinced that it is wrong. We feel that the following passage (at p. 138) from the judgment of that Board in that case delivered by Lord Alness bears citation *in extenso*:

> The appellant is exercising a right of appeal which is his by right, and their Lordships recognise that they cannot merely because the question is one of fact, and because it has been decided in one way by the learned Trial Judge abdicate their duty to review his decision, and to reverse it, if they deem it to be wrong. Nonetheless, the functions of a Court of Appeal, when dealing with a questions of fact, and a question of fact, moreover, in which, as here, questions of credibility are involved, are limited in their character and scope.
>
> This is familiar law. It has received many illustrations - and, in particular in the House of Lords -, the most recent of these being the case of *Powell & Wife v. Streatham Manor Nursing Home,* [1935] AC 243; 104 LJ KB 304; 152 LT 563; 79 SJ 179; 51 TLR 289. In that case it was held that:
>
> > Where the Judge at the trial has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than the appellate tribunal can be: and the appellate tribunal will generally defer to the conclusion which the Trial Judge has formed.
>
> Lord Wright, in the course of his speech, said:
>
> > Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a Trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong'.

Mr. Jagjit Singh complains that there was also a denial of justice when the learned Judge refused an application to impeach the credit of Atun under s. 155(c) of the Evidence Act by the production of the statement or statements he had made to the police. This application was made on the basis of a 'hunch' of Counsel that Atun had in his oral evidence departed from his statement or statements to the police, relying on the decision of this Court in *Husdi v. PP* [1980] 2 MLJ 80 (at p. 81). A 'hunch' is a presentiment, a mental impression or feeling, a vague expectation or foreboding, and we would like to make it abundantly clear that the 'hunch' referred to in *Husdi (ante)* certainly could not have been intended to operate without some secure basis or foundation in order to activate the provisions of ss. 145 and 155(c) of the Evidence Act, and for this purpose sheer innate intuition of Counsel will not suffice. A mere hunch *per se* for this purpose is *nihil ad rem*; it must be secured on a substratum of some basis or foundation. There must as a *sine qua non* be some material contradiction or other circumstances unexplained by the witness in the first instance before Counsel can move to seek to impeach his credit, and in the case of Atun the learned Judge accepted his explanation as to the reason for the delay in intimating to Bahadon, the OCPD Tampin, what he saw in Gan Kee Estate on the night in question. Mr. Jagjit Singh however submits that the examination by Gee, who is also a Government chemist of Mohd. Nordin bin Johan's car for blood stains, bullet holes, human hair, soil and tampering of number plates must have been as a result of information supplied by Atun to the police but we cannot agree that this provides any sufficient basis for any such 'hunch', as Gee's examination would not necessarily be the result of what Atun told the OCPD Tampin, but could well have been a routine examination in the course of police investigation. We accordingly hold that the learned Judge was right in rejecting the application to impeach Atun as there was no basis therefore.

Another witness whose testimony we have to consider is Abdullah bin Ambik (PW30). He was called by the prosecution and apparently intended to be a Crown witness in the case but turned hostile and completely resiled from the statement he made to the police on 21 June 1982 under s. 112 of the Criminal Procedure Code which was put in as P120. An application was made by the Public Prosecutor to impeach his credit under s. 155(c) of the Evidence Act, and the relevant passages in his statement were put to him which were wholly different from his evidence in Court. He admitted making the statement but denied its contents which he said he was forced to state under pressure by the interrogating officer. At the conclusion of examination in chief by the Public Prosecutor the learned Judge refused to allow cross-examination of this witness by Counsel and said that he found serious and material contradictions between the evidence and the statement of this witness to the police and immediately made an order impeaching his credit. The order made by the learned Judge impeaching this witness's credit and denying the right to Counsel for all the accused to cross-examine him was clearly wrong.

When a witness's credit is sought to be impugned under the provisions of ss. 145 and 155(c) of the Evidence Act his credit stands to be assessed as a whole with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. No immediate order of a summary nature can or should be made as was done in this case and the right of cross-examination or re-examination according to the circumstances should not be denied as it may well be that on the exercise of such right his credit might be repaired, restored or re-established [*Paramasivam v. PP* [1970] 2 MLJ 160 (at p. 107); *Sat Paul v. Delhi Administration* [1976] AIR SC 294 (at p. 308)]. This is all the more pertinent in the present instance as Abdullah Ambik had himself raised the issue of the voluntariness of the statement he made to the police and it cannot be a matter of speculation as to what the effect of cross-examination might well have been. To say therefore that cross-examination would have been a waste of time is not a proposition we can in any way consider acceptable or entertain. We are unable to say what cross-examination would have elicited and what different light it could or might have thrown on the situation, and in this connection consider as pertinent this passage from the judgment of Megarry J, *John v. Rees* [1970] 1 Ch 345 (at p. 402):

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

Abdoolcader, J, took the correct approach in *PP v. Datuk Haji Harun bin Haji Idris & Ors.* [1977] 1 MLJ 180 when he refused an application to make an immediate order impeaching the credit of a witness whose evidence contradicted his statement to the police but went on to consider his evidence as a whole at the close of the case for the prosecution and then discounted it as discredited and wholly disregarded it in the circumstances (at p. 192). The procedure for impeachment should be on the lines set out in *Muthusamy v. PP* [1948] 14 MLJ 57 but we must stress that the evidence of such a witness must be considered as a whole with the rest of the evidence at the appropriate stage and that any practice which might have developed, as we are told, in the lower Courts of making an immediate order of impeachment once a material discrepancy is discovered and no explanation is either offered or accepted, is wholly wrong and should cease immediately. We need only observe in reiterating the absolute fallacy of any such wholly unwarranted practice that a testifying witness cannot be dealt with and struck out or struck off *ex tempore* and in midstream at an intermediate stage of the proceedings as if he were a defective writ or pleading.

We will therefore in this case have to determine the effect of the improper way the evidence of Abdullah Ambik was dealt with after a consideration of all the other evidence against the 1st appellant.

As to the ownership of the pistol (P88) by the 1st appellant the prosecution relies on the evidence of SAC Yahya and Inspector Rashid and P16 which is the pistol licence and P17A which is a letter written by the 1st appellant to SAC Yahya. Mr. Jagjit Singh however contends that the hand-written contents of P16 are hearsay and that although the licence itself is primary evidence it does not reflect the truth of its contents, and relies on the decision of the House of Lords in *Myers v. DPP* [1965] AC 1001 and related cases. As to that we would say that in *Myers* (ante) the microfilm records were the only evidence, and in some cases the presumption of regularity will permit the admission of a document without proof of its authenticity and reliance can also be had on the circumstances surrounding its genesis [*Pamplin v. Gorman* [1980] Crim LR 52].

The licence (P16) was issued pursuant to the provisions of ss. 3 and 4 of the Arms Act 1960 in the form prescribed by the Arms Licensing Regulations 1961, and s. 4(5) of the Act clearly makes the licence an original document, the particulars whereof are entered in a register kept by the Chief Police Officer of a State. It bears the 1st appellant's photograph and identity card number which tallies with that appearing in his statement to the police (P119) and also contains the serial number of the pistol which is that of P88. The pistol (P88) together with the magazine with five live bullets (P15), the licence (P16), and a clutch bag (P14) were handed by P.C. Mohd. Sani bin Mohd. Shariff (called by the defence as DW27), the 1st appellant's police bodyguard, together with P17A to Inspector Rashid pursuant to a request by SAC Yahya in a telephone conversation with the 1st appellant, and SAC Yahya was asked by the 1st appellant if he had received the pistol when he went to see the latter in his office subsequently. All this is borne out by the evidence adduced and the disposition and custody of these exhibits until their production in Court were properly accounted for and there was accordingly no break in the chain of evidence [*Su Ah Ping v. PP* [1980] 1 MLJ 75], and the fact that P.C. Sani was not called by the prosecution to testify on this aspect did not constitute any break in the chain. On the evidence P16 was the 1st appellant's licence and no proof of its contents was necessary.

It is also contended on behalf of the 1st appellant that P17A is documentary hearsay and that the handwriting and signature therein must be proved to be that of the 1st appellant. The signature or handwriting in a document may be proved by circumstantial evidence if that irresistibly leads to the inference that the person in question must have signed or written it [*Baru Ram v. Prasanni* [1969] AIR SC 93], and a document can also be regarded as evidence by its contents and the internal evidence afforded by the contents can be accepted as authentication as when it states facts and circumstances which could have been known only to the person to whom the authorship is attributed. The execution or authorship of a document is a question of fact and may be proved like any other fact by direct as well as circumstantial evidence which must be of sufficient strength to carry conviction [*Krishnabiharilal v. State* [1956] AIR MB 86 (at pp. 90-91]. Having regard to the contents of P17A and the letterhead of the Ministry whose portfolio the 1st appellant was then holding as Minister, the evidence of SAC Yahya and Inspector Rashid which confirmed the receipt of the pistol and the licence and the enquiry by the 1st appellant of SAC Yahya as to whether he had received the pistol sent through P.C. Sani together with the ammunition and P17A, the irresistible conclusion is that the handwriting and signature in P17A is that of the 1st appellant and that he wrote that letter.

There is accordingly in the circumstances we have discussed no gap regarding the handing over by and taking possession of the pistol (P88) from the 1st appellant and the evidence clearly evinces that this was the pistol he owned and the fact that the prosecution did not call P.C. Sani did not affect the position or create any gap in the chain of evidence.

On the question of the 1st appellant's possession, custody and control of P88, we have the evidence of SAC Yahya, the statement by the 1st appellant to the police (P119) and the evidence of DSP Bashir who recorded it. The voluntariness of P119 was not challenged and a perusal of that statement shows that the 1st appellant knew which pistol he was talking about. On a careful and considered scrutiny of this evidence we are of the view that the prosecution has established that the 1st appellant was in possession, custody and control of P88 at the material time specified in the charge and that the learned Judge was correct in coming to that conclusion.

We now advert to the evidence of Gee who testified as a firearms identification expert for the prosecution. The evidence discloses that several .32 pistols and revolvers were test-fired by the police and the expended bullets and casings sent to Gee for examination. The errors by the police in the collection and labelling of the test-fired bullets were explained and accounted for in the evidence. Amongst these was P88 and the expended bullets and casings from it were examined by Gee who as a result came to the conclusion that the two bullets taken from the body of the deceased (P18 and P19) and the bullet casings (P4 and P5) had been fired from P88.

Mr. Jagjit Singh strenuously contends that the learned Judge was wrong in accepting Gee as an expert in firearms identification and questions his qualifications, background, working experience, training and experience in Court. The competency of an expert is a preliminary question and is one upon which, in practice, considerable laxity prevails. In *Caldeira v. Gray (ante* at p. 138) the Privy Council said that in assessing the relative value of the testimony of expert witnesses, as compared with witnesses of fact, their demeanour, their type, their personality, and the impression made by them upon the trial Judge - e.g. whether they confined themselves to giving evidence, or acted as advocates - may powerfully and properly influence the mind of the Judge who sees and hears them in deciding between them and that these advantages, which are available to the trial Judge, are denied to an appellate Court. In *Joyce v. Yeomans* [1981] 1 WLR 549, the English Court of Appeal held that in the case of evidence given by experts, the trial Judge, who had observed the demeanour of the witnesses, was in a significantly better position than an appellate Court to assess the value of the evidence given, and accordingly the appellate Court should be slow to interfere with the Judge's findings.

Gee testified that he had done 62 cases of firearms identification which formed the main part of his work over the last six years and that he had given evidence on three occasions in the Sessions and Magistrate's Courts thereon, and had apart from a degree in chemistry practical training in this field. One can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that the expertise is derived from experience and not from formal training [*R. v. Murphy* [1980] QB 434]. The learned Judge who saw and heard Gee accepted him as an expert after a considered assessment of his evidence and we see no reason or justification whatsoever to dissent from his conclusion. Mr. Jagjit Singh complains that Gee has never given evidence in the High Court but we can see no rule requiring this as a prerequisite to accepting him as an expert. He has given evidence, as he said, in the lower Courts and even if he had not that would not debar him from being accepted as an expert if he could satisfy the Court as to his standing, as there

is always a first time for everything. Previous testification in Court as an expert witness is no doubt an added consideration but not necessarily the primary consideration for an otherwise qualified person. The learned Judge has analysed his evidence in some detail, and on a diligent perpension of his evidence through all the three stages of examination we are of the view that the criticisms levelled by Counsel do not detract from the validity of the conclusion as to Gee's evidence which the learned Judge came to. Much was made of the fact that the test-firing was done into cotton waste or blankets but the learned Judge did not find this an unacceptable method, and we agree as there is literature on the subject to this effect.

We now come to the complaint of what Counsel puts forward as a material discrepancy between the evidence of Gee and the pathologist. The pathologist who performed the autopsy said he found one bullet (P18) in the head of the deceased which he described as dented, splintered and shattered. Under cross-examination he said that the X-ray he had taken showed the splinter which was lying in the head. Gee however said that this bullet was dented. We think there was an unfortunate choice of words by the pathologist which taken separately would contradict each other as a bullet could not be shattered and yet be at the same time merely splintered. The point however is whether the bullet extracted from the head by the pathologist was the same bullet that Gee examined. ASP Khew Ching Hoi (PW2), the investigating officer in the case, and Raja Abdul Aziz (PW5), the officer in charge of the Forensic Department of the General Hospital, Seremban, were present at the autopsy. The pathologist handed P18 and the bullet recovered from the folds of the deceased's sarong (P19) to Raja Aziz who put them in a bottle and labelled them. They were subsequently handed to ASP Khew and sent to Gee for examination after which they were returned to ASP Khew. The evidence of the pathologist was corroborated by Raja Aziz and also by ASP Khew and there is also the evidence of Inspector Yahya bin Haji Hussein (PW10) who sent the exhibits to Gee. This was confirmed by Gee who said that on 3 July 1982 he returned all the exhibits to ASP Khew. The chain of evidence with regard to the recovery of the bullets right up to their subsequent production in Court during the trial was complete and there can therefore be no doubt that P18 and P19 were the same ones examined by Gee.

We should perhaps deal briefly with P19 which was recovered from the folds of the deceased's sarong. The pathologist at first took this to have come from the thigh of the deceased and has explained his mistake in taking it in the first instance as having come from the thigh. He said that he had asked Raja Aziz to mark P19 as having come from the thigh because he had been exploring the thigh and in the process he turned the body and found the bullet, bloodstained and intact, but on re-examination he found it was not from the thigh and that it was from the chest. This explanation is substantiated by the evidence of ASP Khew who was present during the autopsy and testified that the slug from the chest was removed without any instrument and it fell off the body when it was turned into the folds of the clothing. The pathologist stated in evidence that the bullet he found embedded in the thigh was not removed as it would have meant mutiliation and amputation of the thigh. In the light of the chain of evidence we have referred to we cannot accept Mr. Jagjit Singh's contention that the failure of the pathologist to take a second X-ray after the autopsy has affected the identity of P19.

Mr. Jagjit Singh also submits that as there were entry and exit holes in the shirt of the deceased and as no bullet was found at the scene of the crime, then the probability would be that the bullet in the chest had in fact gone right through if the deceased had been standing when shot and that he could not have been shot while lying on the ground as the bullet was found in the folds of the sarong. These theories smack of sophistry in the teeth

of the evidence as to the recovery of the bullets which we have referred to, and must be considered in the light of the fact that the exit of a bullet would depend on its velocity and the resistance to its progress in the course of propulsion.

Where a firearms expert has made the necessary tests and there is no reason for distrusting his opinion, which in fact in this case the Court has accepted, there can be no room for thinking in the circumstances established that any one else other than the accused might have shot the deceased [*Kalua v. The State of Uttar Pradesh* [1958] AIR SC 180 (at p. 183)]. In the premises and in the light of the evidence adduced by the prosecution that P88 from which the fatal shots were fired belonged to and was in the possession, custody and control of the 1st appellant at the material time, the facts proved at the close of the prosecution case point to one and only one conclusion, that it was the 1st appellant who fired the fatal shots that killed the deceased. The learned Judge therefore correctly concluded that the prosecution had established a case against him requiring him to enter upon his defence.

There is however the matter of the immediate order of impeachment of Abdullah Ambik and the denial of cross-examination of this witness by Counsel which we have held to be wrong, but in view of the overall strength of the other evidence against the 1st appellant to sustain the charge against him at this stage, we are satisfied that no substantial miscarriage of justice was occasioned on this count and we accordingly apply the proviso to s. 60(1) of the Courts of Judicature Act 1964. We should perhaps observe in the matter of the application of the proviso that the Privy Council in *Anderson v. The Queen* [1972] AC 100 (at p. 108) has now authoritatively pronounced on the proper use of the proviso in murder charges when it said that it cannot be the case that the proviso is never applied in murder cases but in cases of murder great care must be taken to see that there has been no miscarriage of justice. *Anderson* (ante) was followed and applied by the New Zealand Court of Appeal in *R. v. Mckewen* (No. 2) [1974] 1 NZLR 626.

We now proceed to consider the defence of the 1st appellant which is primarily one of alibi but he also sought to explain the question of his possession, custody and control of P88 and the statement he made to the police (P119).

Before we turn to the defence we should perhaps consider and dispose of the question as to whether there is any burden on an accused person when he raises the defence of alibi. The learned Judge in considering the defence of alibi appears to have decided the question on a balance of probabilities, thus throwing a probative but somewhat lighter burden on the 1st appellant. It is contended before us that this was a wrong approach as all that an accused person need do is to cast a reasonable doubt and that he does not in putting forward an alibi as an answer to a charge assume any burden of proving that answer, and we have been referred to English cases to this effect in support of this submission. The position here however would appear to be different in view of the provisions of s. 402A of the Criminal Procedure Code with regard to notice to be given of a defence of alibi which was added by way of amendment to the Code with effect from 10 January 1976. The concluding words of s. 402A(2) 'for the purpose of establishing his alibi' are significant and would seemingly put a probative burden on an accused. The position in England would appear to turn on the specific provisions of s. 11 of the Criminal Justice Act 1967 and we would refer in particular to the provisions of sub-section (1) and the definition of 'evidence in support of an alibi' in sub-section (8) thereof. The Supreme Court of India held in *Gurcharan Singh & Anor. v. State of Punjab* [1956] AIR SC 460 (at p. 462) that the burden of proving an alibi undoubtedly lies on the accused setting up the defence but even so, the burden of proof as to the guilt of the accused always remains on the prosecution irrespective of whether or not the accused

has made out a plausible defence. In *PP v. Chidambaram & Anor*. [1928] AIR Mad. 791 it was held (at p. 793) that alibi evidence should be scrutinised very carefully, for it is easy to set up an alibi and not always easy to prove it, and it must be definitely proved in order to suffice for the rebuttal of a case made out by the prosecution.

The defence of the 1st appellant rests primarily and substantially on that of alibi and he called a large number of witnesses who testified that at or about the time stated in the charge he was in his house in Tampin. On the number of witnesses called to support the defence of alibi, we pause to observe *'testes ponderantur, non numerantur'* (witnesses are weighed, not numbered or counted), that is, in case of a conflict of evidence, the truth is to be sought by weighing the credibility of the respective witnesses, not by the mere numerical preponderance on one side or the other - a principle ossified and reflected in the provisions of s. 134 of the Evidence Act. The learned Judge considered the evidence adduced in some detail and on his assessment and for the reasons he gave held that this defence was unsubstantiated. This is essentially a question of fact and turns primarily on the credibility of witnesses and we have earlier referred to the principles in relation to the functions of an appellate Court in this regard.

Mr. Jagjit Singh has attacked several aspects of the learned Judge's assessment of the alibi evidence but this was more or less an exercise in delving into *minutiae*. In considering whether a defence of alibi has been established the learned Judge is not limited to the evidence as to alibi but must consider all the other evidence as well. The learned Judge has given his reasons in considering the evidence of the alibi witnesses and stated that right through their testimony there were fixed and emphatic assertions of exact times of arrival and departure where these were vital to establish the alibi and he regarded this as contrary to ordinary human conduct in relation to memory of events long gone. To distil and paraphrase the essence of his judgment in summary on this aspect, the learned Judge appears to have greeted with scepticism their evidence on the common ground of their remarkable but questionable and therefore suspect collective recollection of times material to the alibi put forward and in effect expressed cynicism on their role as assiduous time-gazers in the fashion of the dedicated office clock-watcher who at times appeared perhaps in days gone by to be a conventional epiphenomenon of some sedentary jobs. We must bear in mind that he had the benefit and advantage of seeing and hearing these witnesses but as an appellate Court we only have before us their testimony in cold print. The Privy Council had occasion to observe in *Cooper v. Bockett* [1846] 13 ER 365 (at p. 373):

> how very difficult it is for any man, of whatever rank or class (not gifted with uncommon faculties of mind,) to remember with precision and clearness the exact particulars and order of a set of circumstances not involving his own feelings and interests, at a distance of some months from their occurrence.

Mr. Jagjit Singh contends that the evidence of Batumalai (DW10) has destroyed the whole basis of the prosecution case in that he testified that the deceased was in the UMNO office at Gemencheh at 11.30 p.m. on 13 April 1982 but the learned Judge did not touch on or deal with this part of his evidence. He says this evidence was corroborated by Mohd. Nor bin Isa (PW21) who said that he met the deceased at about 12 midnight on 13 April at the UMNO office in Gemencheh and that the deceased left that place after 12.30 a.m. It is submitted that in the face of this evidence there was no reason for the 1st appellant to be waiting in Gan Kee Estate at about 12 midnight on 13 April and that Atun's evidence has accordingly been demolished. We see no substance in this point in the light of the other evidence and the

absence of any evidence as to whether the 1st appellant knew where the deceased was at the time in question. In any event even without Atun's testimony there is sufficient other evidence against the 1st appellant.

The mainstay of the alibi evidence for the 1st appellant was that of P.C. Sani and the learned Judge who saw and heard him has given adequate reasons, with justification in our view, for disbelieving him, to the extent of branding him as 'a pathetic case of misguided loyalty'. The learned Judge has also given his reasons for having grave doubts as to the contents of the visitors' book (D112A) said to have been kept at the operations room in Gemas but even if that book were accepted the question would arise as to whether P.C. Sani was with him at the operations room at the material time in the light of the fact that this visit to the operations room was not entered in his diary and his consistent insistence throughout his testimony that if the 1st appellant's programme was written in his diary he would be with him and if not he would be in the house and that he could not remember anything except what he had written in his diary.

There is then the question as to whether an entirely different light has been thrown on the evidence of Atun as a result of the compurgation by ASP Mohd. Ibrahim bin Abdul Rahman (DW23) who said that on 28 April 1982 he interviewed Atun who never told him the 1st appellant was at Gan Kee Estate or was one of the five persons he saw there and that he wrongly identified the 1st appellant as Abdullah Ambik in the photographs in an UMNO magazine shown to him. The assessment of ASP Ibrahim's evidence is once again a matter of credibility and the learned Judge who saw and heard him has given his reasons for finding no justification to reject Atun's evidence as a result. Mr. Jagjit Singh in his address made an allegation of a witch-hunt against this witness but we find no ground or basis whatsoever for this absolutely unwarranted remark in the face of the evidence. As we have said earlier in any event even if Atun's evidence is disregarded the case against the 1st appellant would not be affected.

Once again in dealing with the defence Mr. Jagjit Singh has severely criticised the findings of Gee and relies on the evidence of George E. Fassnacht (DW43) who was called by the 2nd appellant to testify as a firearms identification expert. Counsel contends that the learned Judge was wrong in holding that Fassnacht is not an expert in this field and not competent to give evidence as such. What the learned Judge in fact said was that he found it difficult to say with certainty that Fassnacht was *peritus* without any further proof of his qualification or experience as his academic qualification which is a B.A. degree in Government has nothing to do with science and his experience was all in a foreign country. We have in dealing with Gee discussed the question of the competency of an expert being a preliminary question for the trial Judge, with reference to authorities on the point. This was a matter for the Judge who saw and heard Fassnacht and we see no reason to interfere with the doubt he has expressed as to Fassnacht's standing as an expert for the reasons he has given.

In any event the learned Judge nevertheless did go on to consider the evidence Fassnacht gave and said he found it neither acceptable nor wholesome enough to cast any doubt on the veracity of Gee's evidence, and we would add that reading his evidence in cold print he appears to have confined himself less to giving evidence and more to acting as an advocate of methodology by launching into a severe criticism of the methods used by Gee and the police in the firing and collection of test bullets and using a shooting box instead of a water tank. In consonance with the principle enunciated by the Privy Council in *Caldeira v. Gray* (*ante*) and in view of conflicting literature on the subject referred to by both sides, we see no reason to interfere with the learned Judge's findings with regard to Fassnacht's evidence.

It is open to a Court to prefer the evidence of one expert to that of another and it would not be improper to act on the opinion of one expert although that is contradicted by another expert [*Joyce v. Yeomans* (*ante*); *R. v. Sodo* [1975] 61 Cr App R 131].

The learned Judge has carefully considered the evidence of the 1st appellant as to his possession, custody and control of P88 at the material time and the explanation he sought to give in respect of his statement to the police (P119), but did not consider this evidence as having cast any reasonable doubt for the reasons he has given. The 1st appellant testified that he was careful about his clutch bag and would not let it out of his sight and then added this depended on circumstances, but we are at a loss to understand what this qualification of his earlier categorical assertion sought to suggest. In his evidence in chief he said that when the pistol was carried in his clutch bag it would be kept in his wardrobe or on his writing table, that when he went to sleep in his house in Petaling Jaya he would keep it in the wardrobe but if he slept in places other than his own house he would put it under his pillow in his bedroom, and that when he put it under the pillow if outstation or in a hotel it would be kept in his clutch bag. He testified that on his return to his house in Tampin at 12.45 a.m. on 14 April 1982 he placed the clutch bag on the table in his room. The suggestion was made that somebody could have taken and used the pistol and replaced it but the learned Judge found this to be highly improbable for the reasons stated in his judgment in dealing with this proposition. The learned Judge found as a fact that the 1st appellant was always evasive in answering any question put to him with respect to the pistol.

Another matter than stands out from the 1st appellant's evidence is that he could remember clearly only the events of the evening of 13 April 1982 until the early hours of the next day and could remember the officers present in his house in Tampin at 12.45 a.m. on 14 April but not at other times, and there were many other occasions and matters put to him in cross-examination as to which his memory did not serve him just as well. It will be borne in mind in this connection that the learned Judge made a specific finding as to the teratical and concerted co-ordination of the relevant times in the evidence of the alibi witnesses.

Although motive is not a necessary ingredient to be established in the offence of murder, it would if shown tend to support the case against an accused so charged. The learned Judge discussed this aspect and found as the background to the events which transpired that the evidence adduced disclosed the existence of political antagonism and discord between the deceased and the 1st appellant and that this was reinforced by the evidence for the defence. The learned Judge observed as a finding of fact that looking at the evidence in its proper perspective it seemed clear to him that the deceased was an obstacle to the expansion of the power and influence of the 1st appellant in the political field.

In all these circumstances the learned Judge found that the evidence adduced by and for the 1st appellant in his defence as a whole has not succeeded in creating any doubt on the truth of the case for the prosecution and we concur with his finding.

In the event we dismiss the appeal by the 1st appellant and affirm his conviction and sentence of death.

One last thing. The Public Prosecutor has made a vehement, and in our view wholly justified, protest against the intemperate language and manner in which it is said Mr. Jagjit Singh both in his petition of appeal and address to us has mounted a virtually personal attack on the integrity of the learned Judge with an overt allegation of intimidation, bias and prejudice and even a fleeting suggestion of conspiracy with the prosecution coupled with a complaint that he had applied double standards in dealing with the witnesses for the prosecution and the defence.

Mr. Jagjit Singh complains in his petition of appeal that the learned Judge improperly and in a manner prejudicial to the defence made a judicial comment to the Public Prosecutor after having impeached the credit of Abdullah Ambik that 'he had slipped out of **our** hands', using the possessive pronoun in the plural and underscoring it, and in his address to us says that this means 'both hands are joined or tied together', thus tending to suggest some sort of collusion on his part with the prosecution. In yet another ground of appeal he says that the learned Judge had improperly and in a manner prejudicial to the defence and without justification intimidated a defence witness Tan Chin Boon (DW11) when he said 'I am 52 years old. Don't try to cheat me. Who do you think you are trying to bluff?' or words to that effect.

The remark in connection with Abdullah Ambik could perhaps have been passed casually to relieve the tedium of an extended trial and could not in any way have affected his judgment and we can see no ground for imputing impropriety and prejudice in this context. With regard to Tan Chin Boon the learned Judge was obviously taken aback when this witness in giving evidence as to his purchase of some fried chicken suddenly and without being asked produced the receipt for the purchase from his pocket which even Mr. Jagjit Singh who was examining him was not aware of. The Public Prosecutor has explained the situation in which the learned Judge made this remark which clearly reflected his annoyance at the way the receipt was produced but he then accepted the witness's explanation and admitted the receipt in evidence. This again could not have coloured his judgment in any way and cannot in our view give rise to any suggestion that he was biased.

It is of course the duty of Counsel to act fearlessly and with all the force and vigour at their disposal in the interest of the cause they represent but wholly within the bounds of propriety and courtesy in the discharge of their duties as officers of the Court but they must equally remember that in the discharge of their duties they must judiciously use the right and privilege of appearing as such in Court and not abuse it [per Abdoolcader J, in *Re Kumaraendran* [1975] 2 MLJ 45 (at p. 48)]. If it can be clearly shown that a justiciar was prejudiced or biased or otherwise conducted himself in an improper manner inconsonant with accepted standards in the administration of justice, then it will certainly be open for the point to be taken. We can however see no justification whatsoever in respect of the matters raised before us by Counsel for the vituperative nature of the language in which the petition of appeal has been couched and the contumelious suggestions that have been put forward in his address to us which has dragged the learned Judge into the arena of the conflict and subjected him to a personal attack with a virtual suggestion of complicity on his part. We consider this line taken ill-chosen, mischievous and contemptuous in the circumstances. The appellants have not been denied a fair trial and the remarks that were subject to attack, though perhaps injudicious, were bereft of any sinister connotation against the background of the circumstances in which they were made, and could not and did not affect the proceedings or cause in any way any miscarriage of justice. We trust that this admonition will suffice to caution against any recurrence of a broadside of this nature grounded on blatantly inane innuendoes without any justification or basis merely in order to advance a cause.

Also found at [1983] 2 CLJ 10